ORIGINAL

Appeal No: 47576-6-II
Clallam County Superior Court No: 13-2-00893-1

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

NATHAN B. SCHLEICHER and MARY L. SCHLEICHER, husband and wife,

Appellants.

v.

BASIL D. BENA,

Respondent

APPELLANTS' OPENING BRIEF

APPEAL FROM THE CLLAM COUNTY SUPERIOR COURT
The Honorable Christopher Melly

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COME NOW the Appellants, and submit the following for consideration.

A. Assignments of Error

1. The trial court erred in entering Conclusion of Law 3(a) (CP 28-29) on April 24, 2015, in at least the following particulars:[1]

a. The court erred in concluding that appellants' lender needed to be in first position to make a loan. (CP 28.)

b. The court erred in concluding that the parties intended a written note and mortgage to be effective only as to appellants' lender, and not between themselves. (CP 29.)

c. The court erred in concluding that the appellants' lender relied upon the release of the note and mortgage in the making of a loan to the appellants. (CP 28.)

d. The court erred in concluding that the note and mortgage remained valid between the parties and they therefore satisfied the real property statute of frauds. (CP 29.)

[1] Because the conclusion of law of the court are lengthy, (3)(c) for example, is 25 lines of text, appellants are adding specific assignments of error to portions of the conclusions of law.

2. The trial court erred in entering Conclusion of Law 3(b) on April 24, 2015, (CP 29) by concluding that the released note and mortgage satisfied the contractual statute of frauds.

3. The trial court erred in entering Conclusion of Law 3(c) (CP 29-30) on April 24, 2015, in at least the following particulars:

a. The court erred in concluding that the parties intended that the release of the note was executed to place the appellants' lender in a first lien priority position. (CP 30.)

b. The court erred in concluding that the note and mortgage retained validity after the execution of the release. (CP 30.)

c. The court erred in concluding the note and mortgage did not merge into the deed at closing. (CP 30.)

4. The trial court erred in entering judgment in favor of the respondents on April 24, 2015, requiring the appellants to re-execute a note and mortgage to the respondents, and in entering judgment in favor of the respondents for $100,000.00. (CP 32-33.)

Issues relating to assignments of error:

1. A writing cannot be found to be viable or enforceable when it is released by an unequivocal writing, despite the parties' subjective intent.

Assignments of error Nos. 1(a), (b) and (c) and 3(a), (b) and (c)

2. A released document cannot satisfy the statutes of fraud.

Assignments of error (1)(d) and (2).

B. Statement of the Case

On May 1, 2011, plaintiff Basil Bena ("Bena") and Jane Brae-Bedell as sellers, and defendants Bruce and Mary Schleicher ("Schleichers") as buyers, executed a residential real estate purchase and sale agreement (the "REPSA") (Ex 1). The RESPA was for the sale of real property owned by Bena, at 1010 East Half Mile Road, Port Angeles, Washington, to the Schleichers (Ex 1). The REPSA stated that the purchase price was $350,000 (Ex 1, p.1, ¶6). The only contingency stated in the REPSA was for the sale of the Schleichers' residence in Gig Harbor, Washington. The REPSA form included an integration clause (Ex 1, p.4, ¶ 'n').

> This Agreement constitutes the entire understanding between the parties and supersedes all prior or contemporaneous understandings and representations. No modification of this Agreement shall be effective unless agreed in writing and signed by Buyer and Seller.

Both Bena and Ms. Brae-Bedell signed the REPSA, although the property was only in the name of Mr. Bena. (RP 91.)

This REPSA was on a form which had been obtained by the Schleichers (RP 27) and was filled out by the parties together, without assistance of either a realtor or an attorney. (RP 199.) The REPSA was read out loud at the time of the signing, in front of all four parties. (RP 171.)

At the signing meeting, Bena (RP 26, 30) and Ms. Brae-Bedell (RP 111), testified that the agreed upon purchase price was actually $450,000. The figure of $350,000 was used in the REPSA because that was the amount that the Schleichers could borrow. (RP 30.) The additional purchase price was to be paid by a note and mortgage held by Mr. Bena, which he described as a "second mortgage". (RP 31, RP 111.) Mr. Schleicher testified that the REPSA statement of a purchase price of $350,000 was correct. (RP 247.) Mr. Schleicher testified that the additional $100,000 was discussed as an amount that Schleichers would be willing to give to respondents because of an illness of Ms. Brae-Bedell. (RP 248, 356.) Benas testified the promissory note (Ex 3) and the mortgage (Ex 2) were prepared on May 1, 2011 (RP 42) but they were not signed that day because there was no printer available to print the documents. (RP 43.) Schleichers denied that the documents were seen by them on May 1, 2011. (RP 249, 361.)

The promissory note (Ex 3) and mortgage (Ex 4) were signed by Schleichers on August 30, 2011. (RP 249.) Both Mr. Schleicher (RP 253) and Mrs. Schleicher (RP 361-362) testified they first saw the note and mortgage on the day they were signed. The promissory note provided for payment of $100,000, five years after its date, without any interest (Ex 3). The mortgage applied to the property to be purchased in the future by

Schleichers (Ex 2). The documents contained no language limiting their purpose to a charitable act by the Schleichers toward the Benas.

On the same date and at the same time, Bena signed a "release of mortgage" (Ex 4), and deposited all three of the documents into a safe deposit box. (RP 51.) The release provided:

> The undersigned, Basil D. Bena, of Port Angeles, Washington, hereby certifies that the mortgage, dated 30 August 2011, executed by Nathan Bruce Schleicher and Mary Louise Schleicher, as mortgagees, to Basil D. Bena, as mortgagor, and has not been recorded, together with debt secured by said mortgage, has been fully paid, satisfied, released and discharged, and that the property secured thereby commonly referred to as 1010 East Half Mile Road has been released from the lien of such mortgage.

The document, dated August 30, 2011, was signed by Bena, and his signature was notarized. The reason for signing the release was in case something happened to Mr. Bena before the note came due, when the release would work as an "inheritance" to the Schleichers. (RP 50-51.) Ms. Brae-Bedell thought that the note might never be enforced and might be a gift to the Schleichers. (RP 118-119, 210.)

Because they were leaving on an extended trip the next week, and would be gone until the proposed closing date, Bena on that same day signed a Statutory Warranty Deed and Real Estate Excise Tax Affidavit for the sale of the property at Clallam Title Company in Port Angeles. (RP 47-48.) These were to be held by the Title Company until the actual

date of closing. The deed conveyed and warranted the real property to the Schleichers (Ex 13). The Real Estate Excise Tax Affidavit signed by Bena that same day stated that the purchase price of the property was $350,000.00 (Ex 12).

Two appraisals of the property were obtained during the lending process. The first, in July of 2011, stated the value to be $315,000.00 (RP 252), while the second, in December of 2011, after improvements to the real property by the Schleichers (RP 267) stated the value to be $350,000.00 (Ex 14).

On January 4 of 2012, as part of the lending process, Schleichers were required to sign an "undisclosed debt acknowledgment" for their lender (Ex 5). This document provided that:

> I/We have no additional debt obligations other than those disclosed on the 1003/Loan Application of the same date hereof, that are expected to exist at/or around the time of this transaction closing. I (we) further acknowledge and certify that I (we) understand that knowingly withholding debt obligation information is mortgage fraud, which is punishable by incarceration in federal prison.

Within two weeks of signing the undisclosed debt acknowledgment, Schleichers became concerned about the existence of the August note and mortgage, as it related to this document. (RP 264.) They contacted an attorney to discuss the situation, whose advice to them was that the loan

and mortgage had to go away because of the possibility of loan fraud if they obtained a loan without full disclosure of the liabilities. (RP 331.)

They contacted Bena to discuss the existence of the loan and mortgage. (RP 265.) The testimony disagreed upon the nature of this conversation. Mr. Schleicher testified that he advised Bena that the note and mortgage created two problems: 1) it would constitute mortgage fraud if he did not disclose the existence of the note and mortgage, and 2) he would not get a mortgage at all if he disclosed the note and mortgage. (RP 266.) This statement was repeated in an e-mail to Mr. Bena dated January 30, 2012 (Ex 16). Bena agreed that he did not want Mr. Schleicher to commit mortgage fraud. (RP 266.) Bena testified that he agreed to sign a new copy of the previously executed release (RP 70-71), upon the promise of Mr. Schleicher that they would re-issue the note and mortgage. (RP 71.) The new release (Ex 3), was executed and notarized, and forwarded to Mr. Schleicher. (RP 71.) In response to a request from the Schleichers' lender, the second release was accompanied by a letter from Mr. Bena addressing certain questions asked by the lender. This letter also was notarized and included a statement that there was no mortgage on the property (Ex 8). The release was not forwarded to the Schleichers' lender, while the statement was. (RP 275.)

Mr. Schleicher testified there was no discussion of, and he made no agreement to, re-execute the note and mortgage. (RP 276-277.)

The sale then closed on March 16, 2012 (Ex. 13), Schleichers paid the title company $350,000 plus closing costs specified in the REPSA (Ex 10). Excise tax was paid by Bena on $350,000 (Ex 10 and 12).

Before the end of March 2012, Bena contacted Mr. Schleicher and inquired as to when he would issue a new promissory note and mortgage. Mr. Schleicher stated that he had no idea what Bena was talking about and declined to sign a new note and mortgage. (RP 279.) No new note and mortgage was ever issued.

C. Summary of Argument

The court interpreted written documents executed by the parties on the basis of the intent of the parties it determined on contested evidence, and then enforced its interpretation of the intent that it found, even though the determined intent contradicted all documents signed by the parties. This decision is contrary to a number of rules of contractual interpretation.

The written documents signed by the parties stated as follows:

a. The REPSA, signed on May 1, 2011, stated that the purchase price for the property was $350,000.

b. The REPSA contained an integration clause.

c. The note for an additional $100,000 and mortgage signed in August of 2011, were released and satisfied by a document dated August 30, 2011, and by another release dated February 3, 2012.This latter release was actually delivered to the maker of the note and mortgage (Ex. 33).

d. The deed, dated March 16, 2012 (Ex. 13), and the accompanying Real Estate Excise Tax Affidavit filed with the deed on March 20, 2012, stated that the purchase price of the property was $350,000, and tax was paid on that amount.

The court ruled that the parties intended the purchase price to be $450,000, and that the release of the note and mortgage were intended to be effective only as to the lender, and not between the parties. The note and mortgage therefore remained in effect between the parties, and the court enforced both those instruments. Both of these rulings use parol evidence to contradict the writings between the parties.

These rulings misapply the substantive effect of the parol evidence rule, and are in in contravention of a number of doctrines designed to enforce the writings between the parties; Schleichers argued below both complete integration of the contract, and merger of antecedent agreements into the deed. All three of these doctrines reject the approach to contract interpretation of the trial court.

The effect of the court's decision is to create a situation where written and definite writings signed by the parties can always be overridden by a court's decision that the intent of the parties was different than the writings. Contracts then become subject to judicial interpretation at all times. Using this rationale, a court may determine, based upon its evaluation of the subjective (and differing) statements of the parties that there was a parol agreement different from what was written, and may then enforce that agreement as the court determined it to be. Written documents become meaningless, and parties may testify differently than the writings, and hope that the court accepts and enforces their testimony of an oral agreement contrary to the writing. Contract interpretation becomes always a, "He said, she said" argument. Such a result upsets completely, the idea that written documents have significant and preclusive effect.

D. Argument of Counsel

This case involves "conclusions of law" which appear to include findings of fact in those statements. The Appellate Court independently determines whether conclusions are, in actuality, findings. *Illener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2 45 (1986). The trial court's conclusions of law contain statements concerning the intent of the parties to an alleged agreement, and such determination are generally findings of

fact. *Berg v. Hudesman*, 115 Wn.2d 657, 688, 801 P.2d 222 (1990). Findings of fact are reviewed under the substantial evidence rule of *Thorndike v. Hesperian Richards, Inc.,* 54 Wn.2d 570, 343 P.2d 183 (1959). Substantial evidence to support a finding of fact exists, "if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declare premise." *King County v. Wash. State Boundary Review BD.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993). Those portions of the conclusions of law which are truly legal conclusions are reviewed by the appellate court de novo. *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241, (2001).

1. Certain conclusions of law which are findings of fact are not supported by substantial evidence.

Of the statements in the court's conclusions of law upon extrinsic evidence and denominated error by appellants, there is no substantial evidence to support at least three.

The court's finding that the release to be effective only as to the lender was based, in part, upon the court's finding that the release was relied upon by the lender. (CP 28.) There is no evidence that the release was ever submitted to the lender, and this statement of the court is therefore without support.

The court's finding that the parties intended the lender to be in first position, and the note and mortgage in second position (CP 28, 30), is also not supported by substantial evidence. There is a passing mention in the evidence that Bena's interpretation was that it would be a second position (RP 44). There is nothing in the record that suggests that Schleichers ever thought about lien priorities in their dealings with the note and mortgage. Their only concern was what it had to go away because of possible fraud implications.

The court's finding that the Schleichers could obtain financing only if the lender was in first position (CP 28), is not supported by any testimony in the record whatsoever.

2. A writing cannot be found to be viable or enforceable when it is released by an unequivocal writing, whatever the parties' subjective intent.

   a. Washington follows the "objective" theory of contracts.

The principle duty of the courts when interpreting a contract is to be guided by the intention of the parties. *In re Estate of Bachmeier*, 147 Wn.2d 60, 68 52 P.3d 22 (2002). The court is not attempting to create an agreement for the parties, but to decide what their agreement is. Ibid

As a general principle, Washington follows the objective theory of contracts. *Wilson Court Ltd. P' ship v. Tony Maroni's, Inc.,* 134 Wash.2d 692, 699, 952 P.2d 590 (1998). *King v. Riveland,* 125 Wash.2d 500, 505,

886 P.2d 160 (1994). Keystone Land & Development Company v. Xerox Corporation, 152 Wash.2d 171,177-178, 94 P.2d 945 (2004).

The rules of this theory are stated in *Multicare Medical Center v. State Dept of Social and Health Services*, 114 Wn.2d 572, 586-587, 790 P.2d 124 (1990:.

> To determine the mutual intentions of contracting parties, we follow the objective manifestation theory of contracts. *Everett v. Estate of Sumstad,* 95 Wash.2d 853, 855, 631 P.2d 366 (1981). Thus, the unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations. *Everett,* at 855, 631 P.2d 366; *Washington Shoe Mfg. Co. v. Duke,* 126 Wash. 510, 516–17, 218 P. 232, 37 A.L.R. 611 (1923). To determine whether a party has manifested an intent to enter into a contract, we impute an intention corresponding to the reasonable meaning of a person's words and acts. *Everett,* at 855, 631 P.2d 366; *American States Ins. Co. v. Breesnee,* 49 Wash.App. 642, 646, 745 P.2d 518 (1987). Accordingly, if the Hospitals, judged by a reasonable standard, manifested an intention to agree to the arrangements in question, that agreement is established regardless of the Hospitals' real, but unexpressed, intent. *Everett,* 95 Wash.2d at 855–56, 631 P.2d 366; *Wesco Realty, Inc. v. Drewry,* 9 Wash.App. 734, 735, 515 P.2d 513 (1973).

b. <u>The substantive parol evidence rule does not permit the use of extrinsic evidence to contradict writings.</u>

In the effort to make an "objective" interpretation of an agreement, evidence which is extrinsic to the written agreement between the parties is admissible for the purpose of explaining the context of the agreement and

for explaining the parties' intent. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). The purpose of this rule is discussed at 25 Wash.Prac. Contract Law and Practice § 4.3 (3d Ed.):

> The policy behind the parol evidence rule is to give written documents a preferred status so as to render them immune to perjured testimony and the risk associated with the "slippery memory." The rule also exists to demonstrate that an offered term has been excluded because it was superseded by a writing and was not intended to be a part of the consent. Additionally, the parol evidence rule is designed to compel the parties to reduce their entire agreement to writing. The desired object of the rule is to secure business stability.

Even if admitted without objection, however, such evidence is incompetent to overrule the parties' writings if that evidence seeks to contradict the written agreements between the parties. The rule is stated thusly in *Emrich vs. Connell*, 105 Wn.2d 551, 555-556, 716 P.2d 863 (1986):

> The parol evidence rule, as traditionally stated in Washington, provides:
>
> [P]arol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake.
>
> *Buyken v. Ertner,* 33 Wash.2d 334, 341, 205 P.2d 628 (1949). It is not a rule of evidence but one of substantive law. *Barber v. Rochester,* 52 Wash.2d 691, 696, 328 P.2d 711 (1958). Thus, prior or contemporaneous negotiations and agreements are said to merge into the final, written contract, and any evidence of these, even if admitted without

> objection, is rendered incompetent and immaterial by operation of the rule. *Fleetham v. Schneekloth,* 52 Wash.2d 176, 179, 324 P.2d 429 (1958).

Stated another way, parties are bound by their written contracts, *Max L. Wells Trust vs. Grand Central Hot Tub and Sauna of Seattle*, 62 Wn.App. 593, 601-602, 15 P.2d 284 (1991):

> Thus the court's duty is to ascertain the intent of the parties at the time the contract was made. As an aid in ascertaining the intent of the parties, a court may admit extrinsic evidence relating to the entire set of circumstances under which the contract was formed, including the subsequent conduct of the contracting parties.
>
> However, the general rule is also that the parol (extrinsic) evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident or mistake, but is admissible to show the situation of the parties and the circumstances at the time of the execution of the written instrument for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence is not admitted for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. *J.W. Seavey Hop Corp. v. Pollock,* 20 Wash.2d 337, 348–49, 147 P.2d 310 (1944) (cited with approval in *Berg v. Hudesman,* 115 Wash.2d at 669, 801 P.2d 222).

It is respectfully submitted that the release of the note and mortgage signed by Bena and delivered to Schleichers in February of 2012 is not susceptible of being interpreted as to be ineffective between the parties. The fact that there was no

payment at that time is not determinative of an intent not to release the obligation. Obligations are released for a myriad of reasons, such as forbearance, gift, litigation, etc., without payment. Such an interpretation is directly contrary to the language of the release document. The fact that Bena sued to enforce the promise to re-issue the note and mortgage, and not to enforce the first note and mortgage (CP 91) demonstrates that even he thought that the release was valid and effective.

c. The doctrine of integration similarly limits interpretation contrary to the meaning of the document.

The parties to an agreement are entitled to have a contract which is either fully integrated (all items are contained in the written agreement), partially integrated (additional terms may be proved by extrinsic evidence), or completely oral (all terms are proven by extrinsic evidence). *Lopez v. Reynoso*, 129 Wn.App 165, 171, 118 P.3d 398, (2005).

Contracts frequently contain written "integration" clauses which state that an agreement is fully integrated and not subject to modification or change by oral evidence. However, courts will not enforce "boilerplate" integration clauses. This rule is stated in *Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241,250-251, 450 P.2d 470 (1969):

> We find, in view of the overwhelming evidence of this case, it is obvious that the above statement of the earnest

> money agreement is false and therefore we will not adhere to it....To now hold that the 'boilerplate' at the conclusion of the earnest money agreement would vitiate the manifest understanding of the parties as evidenced by this record would amount to a constructive fraud practiced by the defendants upon the plaintiffs.
>
> See, *Thompson v. Huston*, 17 Wash.2d 457, 135 P.2d 834 (1943); *Lou v. Bethany Lutheran Church*, 168 Wash. 595, 13 P.2d 20 (1932) ; *Starwich v. Ernst*, 100 Wash. 198, 170 P. 584 (1918). We therefore hold that the sentence in the earnest money agreement denying the existence of any other agreement is not controlling. There was not a total integration of the contract within the earnest money agreement despite said language, for the parties very definitely did negotiate and agree to preserve the Blacks' view of the east channel. This covenant, though not recorded, is not contrary or inconsistent with the deed and, therefore, did not merge with the conveyance of the deed; rather, is has been shown to be an integral part of the purchase contract and is enforceable under the doctrine of partial integration. [Emphasis added.]

Thus, even if the trial court in this case was not inclined to enforce the integration clause of the REPSA, terms inconsistent with the writing may not be enforced. Only additional agreements not reflected in the agreement are not barred by the integration clause.

The operation of this doctrine is shown in *Lopez v. Reynoso,* supra. Ms. Lopez paid $2,000 down for a car, but signed a purchase money contract saying that down payment was $500, with an additional $6,000 owed, payable in 27 installments. When she missed a payment, she then claimed that the $2,000 was part of the sales agreement price, and she had fully paid that price. *Lopez, supra* at 402:

> With a written contract, "it is the court's duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not. That is a question of fact." *Barber,* 52 Wash.2d at 698, 328 P.2d 711. If the writing is a complete integration, any terms and agreements that are not contained in it are disregarded. *Morgan,* 34 Wash.App. at 807, 663 P.2d 1384 (quoting 5 R. Meisenholder, Washington Practice § 121, at 125 (1965)). If it is not intended to be the complete expression of the parties' intent—in other words, if it is only partially integrated-the writing may be supplemented or replaced by consistent terms or agreements shown by a preponderance of the evidence. *Id.; see also Denny's Rests., Inc. v. Sec. Union Title Ins. Co.,* 71 Wash.App. 194, 202, 859 P.2d 619 (1993).

While the court affirmed the trial court's admission of extrinsic evidence, the heart of the court's ruling was stated as follows, 129 Wn.App at 172:

> Assuming that the written sale agreement was only partially integrated and that the parties had orally agreed to additional terms, we address the remaining question: whether the purported oral agreement contradicts any valid terms of the written contract. *Emrich,* 105 Wash.2d at 557, 716 P.2d 863. Evidence that the parties agreed to reduce the sale price by the $2,000 down payment is not inconsistent with the actual terms of repayment included in the contract and the amortization schedule. The reduced price of $6,000 *does* contradict the written terms of a $6,500 sale price and a $500 down payment, but the result is the same: a contract price of $6,000 for a vehicle originally priced at $8,500. Ultimately, the extrinsic evidence of prior negotiations reveals terms that do not contradict the written terms of the vehicle's price and the number of payments Ms. Lopez owed.

The term here sought to be enforced despite the integration clause in the REPSA, is directly contrary to the terms of the REPSA, as it alters one of the central clauses of a REPSA, the purchase price. Such a term is also contrary to at least three other writings between the parties; the release, the note accompanying the release, and the excise tax affidavit used for closing. Benas argument can be stated, simply, as "we don't care what we signed, that was not the agreement that we intended."

d. The doctrine of merger also prohibits the use of extrinsic evidence contrary to the terms of a deed.

Extremely similar to the doctrine of integration is the doctrine of merger, which provides that antecedent agreements regarding the sale of property are merged into the deed. In *Synder v. Roberts*, 45 Wn.2d 865.871, 278 P.2d 348 (1955), the court stated;

> The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed carrying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed. *City of Bend v. Title & Trust Co.*, 1930, 134 Or. 119, 289 P. 1044, 84 A.L.R. 1001; *Miller v. Kemp*, 1931, 157 Va. 178, 160 S.E. 203, 84 A.L.R. 980; *Duncan v. McAdams*, Ark., 1953, 257 S.W.2d 568, 38 A.L.R.2d 1307.

The Snyder court then went on to identify that the doctrine was not absolute:

> It has long been the general rule of the law in this state that the provisions of a contract for the sale of real estate, and all prior negotiations and agreements, are considered merged in a deed made in full execution of the contract of sale. *Davis v. Lee*, 52 Wash. 330, 100 P. 752 (1909); *Peoples Nat. Bank v. National Bank of Commerce of Seattle*, 69 Wash.2d 682, 420 P.2d 208 (1966). However, this rule is not ironclad and in the past this court has found grounds for exceptions. See, *Becker v. Lagerquist Bros., Inc.*, 55 Wash.2d 425, 348 P.2d 423 (1960); *Cf. Shelton v. Fowler,* 69 Wash.2d 85, 94-96, 417 P.2d 350 (1966); *Gronlund v. Andersson*, 38 Wash.2d 60, 227 P.2d 741 (1951). After stating the general rule, in *Snyder v. Roberts*, 45 Wash.2d 865, 872-873, 278 P.2d 348, 52 A.L.R.2d 631 (1955), we made reference to these exceptions:
>
> Intrigued by the problem presented, we have made an extensive, intensive, and, we must confess, frustrating exploration of the authorities, to discover some way (on solid ground) around what *Kent, C.J.*, in *Howes v. Barker*, 1808, 3 Johns., N.Y. 506, 3 Am.Dec. 526, called 'the impediment of the deed,' which he was unable to 'surmount.'
>
> There are many exceptions to the doctrine of merger, but for the most part they are applied in cases where either the grantor or the grantee is attempting to enforce against the other, stipulations in the contract which are not contained in, not performed by, and not inconsistent with the deed and which are held to be collateral to or independent of the obligation to convey.

Parties may change or alter the form of the agreement before completion of a real estate transaction, but the contract between them becomes fixed when the property sale is concluded by the recording of a deed. While this doctrine recognizes a number of exceptions, those relate to the enforcement of obligations which are collateral to or independent of

the obligation to convey. *Black*, supra at 249, where the court found there to be an additional promise to buyers concerning preservation of their view, which was not barred by a boilerplate integration clause:

> This covenant, though not recorded, is not contrary or inconsistent with the deed and, therefore, did not merge with the conveyance of the deed; rather, is has been shown to be an integral part of the purchase contract and is enforceable under the doctrine of partial integration.

The application of the rule is thus quite similar to both the parol evidence rule and the integration doctrine, permitting extrinsic proof of an agreement which does not contradict the deed. As discussed before, the additional $100,000.00 purchase price is directly contradictory to the REPSA, and to all of the documents signed before closing confirming that to be the purchase price.

e. Conclusion concerning interpretation of the contract.

The trial court's ruling on this issue was that the parties did not intend for the promissory note and mortgage to be extinguished by the deed. Conclusions of Law, CP 30.

It cannot be disputed, however, that all written expressions of the intent of the parties, including documents executed by the Benas, stated that the purchase price of the property was $350,000. The REPSA so stated. The excise tax affidavit stated the price subject to tax to be

$350,000. The release document executed by Mr. Bena released any prior note and mortgage. Mr. Bena's statement delivered to Mr. Schleicher stated that there was no mortgage on the property. All of this evidence unambiguously states that the purchase price was $350,000. Nonetheless, the Benas convinced the trial court to ignore the consistently expressed terms of the agreement between the parties, and to accept the contested testimony of Mr. Bena most specifically concerning the effect of his execution of the release. This was use of parol evidence to directly contradict a number of writings. Such a use of parol evidence, even though admitted without objection, is contrary to the three doctrines of la noted above, and the purpose of those doctrines, to carry into effect expressed and written statements of the agreement between the parties, despite contrary intentions.

Further, given the concerns specifically alleged by Mr. Schleicher that he could be committing mortgage fraud by not revealing the $100,000 mortgage, it is illogical to conclude that he nonetheless intended that obligation to spring again into existence after his loan and the real estate purchase had closed. This is particularly true, when the trial court relied for this intent upon the determination that the parties intended to alter lien priorities, for which there was only passing reference to this concept by Bena, and despite the court's statements that the lender relied upon the

release, when there was no evidence to show that the lender ever received the release.

3. The statute of frauds applies to bar enforcement of the oral promise to reinstate the note and mortgage.

Should the court determine to review the effect of the alleged oral promise to reinstate the note and mortgage, appellants contend that such oral promise, if made at all, is not enforceable by operation of the statutes of frauds.

Plaintiffs' complaint specifically states that the relief requested is to require the defendants to, "... fulfill ..." the oral promise (presumably the one made after closing) to re-execute a note and real estate mortgage signed on August 30, 2011. (RP 91, ¶ 2.9, lines 18-20.)

a. The Real Estate Statute of Frauds.

The record contains no evidence beyond the oral testimony of Mr. Bena that Mr. Schleicher promised to reinstate the promissory note and mortgage, if Mr. Bena would release the earlier signed documents, so as to permit Mr. Schleicher to avoid committing fraud upon his lender. Washington's Statute of Frauds for Real Property transactions is stated at RCW 64.04.010:

> Every conveyance of real estate or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed....

The rationales of the statute of frauds is stated in *Richardson v. Cox*, 108 Wn.App. 891, 890 and 26 P.3d 920 (2000):

> We begin by noting the well-established principle in Washington that, in general, conveyances of real property must be in written form. RCW 64.04.010. The original purpose of the real estate statute of frauds was to provide proof that the alleged agreement was made. Another purpose serves a cautionary function, by bringing home the significance of the conveyance, which would prevent impulsive action. *See* II E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 6.1, at 85 (1990). More importantly, the purpose behind the statute is to prevent the fraud that may arise from the uncertainty inherent in oral contractual undertakings. *Miller v. McCamish*, 78 Wash.2d 821, 828, 479 P.2d 919 (1971).

This principle is consistently applied to purchase and sale agreements, *Martin v. Siegel*, 35 Wn.2d 223, 212 P.2d 107 (1949). Washington Real Property Desk Book, Volume 4, Causes of Action, Chapter 2, Statute of Frauds at section 2.5 page 2-18, cites *Fidelity and Casualty Co. v. Nichols*, 124 Wash. 403, and *Bremner v. Shafer*, 181 Wash. 376, 43 P.2d 27 (1935) for the proposition that mortgages are required to comply with the statute of frauds. The cases deal, however, with an improperly acknowledged written mortgage which the court enforced between the parties despite the defective acknowledgment. In regard to a purely executory contract to create a mortgage, the author of the Desk Book states, at page 2-19:

> No Washington court has yet decided the issue of enforceability of a completely executor contract to execute a mortgage. However, it should probably be

> assumed that an executory contract to execute a mortgage must be in writing.

Professor Stoebuck also agrees that the formation of mortgages must conform to the statute of frauds, stating: 18 Wash. Prac. Real Estate, Sec. 17.5 (2nd Ed.):

> RCWA 61.02.020, the statute discussed in the precedent section that contains the form of a mortgage, does not require a mortgage to be signed and acknowledged. However, those elements are required by the statute of frauds for dies, which the Washington Supreme Court applies to mortgages....

No interest in real estate can be created in this case because of the failure to comply with the real property statute of frauds.

b. The Contract Statute of Frauds.

Again, because of a lack of a writing establishing a promise by the defendants to pay them $100,000 after five years, the statute of frauds comes into play. Washington's Contract Statute of Frauds is stated at RCW 19.36.010:

> In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof.

This rule is discussed in *Gronvold v. Whaley*, 39 Wn.2d 710, 237 P.2d 1026 (1951), particularly as relating to the requirement that if the contract took more than one year to perform, it had to be in writing to satisfy the statute of frauds. The court stated:

> (The statute) has application only where the contract, *by its terms*, can*not* be performed within one year. Respondents, on the other hand, contend that the statute applies if, upon looking to the surrounding circumstances and considering the object contemplated by the contract, it can be determined that the parties intended that its performance should extend beyond one year from the making thereof. ...
>
> After a careful analysis of our decisions on this point, we conclude that the contract statement of the rule is as contended by appellant, that a contract does not fall within the provisions of Rem.Rev.Stat. § 5825(1) unless, by its terms, it cannot be performed within one year from the making thereof.

In the present case, the alleged note calls for payment five years after its date. That fact, alone, places it within the statute of frauds requiring a writing, of which there is none.

c. <u>The alleged contract to pay an additional $100,000 for the property after closing is illegal.</u>

The trial court did not address the Schleichers' contention that enforcement of the alleged contract was unenforceable because it was illegal. Should the court determine that the parties entered into an

enforceable agreement between them, however, appellants submit that such contract would be illegal.

In a very general sense, Washington courts will not enforce what are characterized as "illegal contracts." The result of an illegality is quite clear, 25 Wash. Practice, Contract Law and Practice §7.1 (2nd Ed.):

> If a contract is deemed illegal, Washington courts will not enforce the contract, and will leave the parties to the contract where the court found them. This is also true in cases where a contract grows out of or is connected to an illegal act. Generally, a contract that is contrary to the terms of the policy of an express legislative enactment is illegal.

In this situation, the court has ordered that an instrument which was requested by the Schleichers to "go away" because it was requiring them to make a false statement to a lender, was nonetheless intended to remain valid and enforceable. The continuation of such a situation leaves all parties participating in an act of deception of the Schleichers lender.

Washington has a statute, RCW 19.144.080 which makes it unlawful to make a misstatement to a lender:

> It is unlawful for any person in connection with making, brokering, obtaining, or modifying a residential mortgage loan to directly or indirectly:
>
> (1)(a) Employ any scheme, device, or artifice to defraud or materially mislead any borrower during the lending process; (b) defraud or materially mislead any lender, defraud or materially mislead any person, or engage in any unfair or deceptive practice toward any person in the

> lending process; or (c) obtain property by fraud or material misrepresentation in the lending process;
>
> (2) Knowingly make any misstatement, misrepresentation, or omission during the mortgage lending process knowing that it may be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process;
>
> (3) Use or facilitate the use of any misstatement, misrepresentation, or omission, knowing the same to contain a misstatement, misrepresentation, or omission, during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process; or
>
> (4) Receive any proceeds or anything of value in connection with a residential mortgage closing that such person knew resulted from a violation of subsection (1), (2), or (3) of this section.

In this instance, the patties all knew that it was necessary for the defendants to obtain a loan to finance the purchase of the plaintiffs' property. In making a loan, it is axiomatic that the lender relies upon the debt load of the borrower as a major factor in deciding whether to make a particular loan. The court's decision has created an undisclosed "hidden obligation" so that the Schleichers' statement to the lender were inaccurate. Nonetheless, the court's decision returns Schleichers to the status of having misled their lender as to their debt load.

The allegations that the purchase price is really $450,000 would also involve a violation of the Real Estate Excise Tax Statute, Ch. 82.45. RCW

82.45.060:

> There is imposed an excise tax upon each sale of real property at the rate of one and twenty-eight one-hundredths percent of the selling price.

This tax is based upon the selling price of the property, defined by RCW 82.45.030(1):

> As used in this chapter, the term "selling price" means the true and fair value of the property conveyed. If property has been conveyed in an arm's length transaction between unrelated persons for a valuable consideration, a rebuttable presumption exists that the selling price is equal to the total consideration paid or contracted to be paid to the transferor, or to another for the transferor's benefit.

Total consideration to be paid is defined by RCW 82.45.030 (3):

> (3) As used in this section, "total consideration paid or contracted to be paid" includes money or anything of value, paid or delivered or contracted to be paid or delivered in return for the sale, and shall include the amount of any lien, mortgage, contract indebtedness, or other encumbrance, either given to secure the purchase price, or any part thereof, or remaining unpaid on such property at the time of sale.

By executing the excise tax affidavit in this case, the plaintiffs' understated total consideration paid for the property, and underpaid the necessary excise taxes. Given the language of the excise tax affidavit, the plaintiffs' action constitutes perjury. The contract to be enforced between the parties is for the purchase price of the property to be $350,000.00.

E. Conclusion

Appellants respectfully request that the court reverse the trial court's failure to enforce the agreements between the parties as written. The case should be remanded, based upon the conclusion that the release was valid as between the parties, and that the alleged oral promise to re-instate the note and mortgage are unenforceable because they fail to comply with the statutes of fraud.

DATED: January 4, 2016

CRAIG L. MILLER & ASSOCIATES, P.S.

By _____
CRAIG L. MILLEER, WSBA #5281
Attorney for Appellants

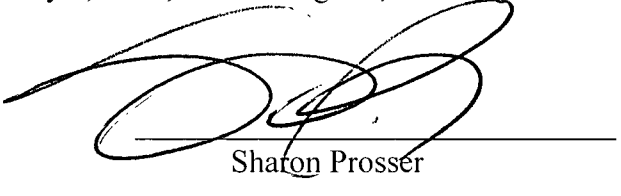
CERTIFICATE OF SERVICE

I, Sharon Prosser, certify that on January 4, 2016, I caused a true and correct copy of this RESPONDENTS' OPENING BRIEF to be served on the following in the manner indicated below:

Valerie A. Villacin, WSBA 34515 Smith Goodfriend, P.S. 1619 8th Avenue North Seattle, WA 98109	[ ] facsimile @ [X] U.S. 1st Class Mail [ ] Email @ [ ] hand delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED January 4, 2016, at Port Angeles, Washington.



Sharon Prosser